



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 1 OF 2012

REPUBLICPROSECUTOR

VERSUS

D K M..... ACCUSED

JUDGMENT

The accused D K M is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the nights of the 1st day of January, 2012 and 2nd day of January, 2012 at [Particulars Withheld] in Wareng District of the Rift Valley Province murdered J C M.

THE EVIDENCE

The prosecution called a total of eight witnesses.

PW1, Doctor Paul Korir Rono of Moi Teaching & Referral Hospital produced a copy of the medical examination report (P3 form) that was filled by Dr. Nyaura in respect of the accused on 18th January, 2012. The same indicated that the accused was mentally fit to stand trial. He produced it as P. Exhibit 1.

PW2 was a minor, A K was first examined by the Court to assess his suitability to take an oath. The court ruled that he would give an unsworn statement of evidence. He

testified that he recalled on the fateful day, his mother and father arrived home and his father began to beat his mother with a stick. He stated that the violence continued for a long time. His father beat her on the knees as she cried.

PW2 stated that though they lived in a one roomed house, he did not hear anything that transpired in the night. His father joined his mother in bed and they both slept. On the following day, his father sought to wake his mother up but she did not respond. When she did not awake, the accused person began to dress her up. PW2 recalled that the father had told the mother to undress so that he could beat her and he beat her while naked. He told the court that the accused prepared breakfast for them. He did not go to work. A mama Koech and other people arrived at their home while he and his siblings went to stay at their elder brother Kirwa's home.

He told the court that his parent's would fight often as they both took alcohol but he could not tell whether they had drank alcohol on that day.

PW3 H K a farmer and business man told the court that on 1st January 2012, he and his brother had gone home after celebrating the new year. They later went to buy cigarettes and proceeded to go and drink chang'aa. Later one K called him outside the drinking den. He identified him as the accused person before the court and stated that he was known to him as the boyfriend of his sister J C. The accused had been co-habiting with his sister but he had not paid dowry. His sister had had 6 children before she began living with the accused person and later got 3 children with him. The 6 children did not live with the accused. They lived on a farm that was given to the deceased by her father where the former visited them.

The witness told the court that when the accused person called them out, they thought

that he wanted to buy them alcohol. Instead, the accused told them that he had tried to wake J up to make breakfast in vain.

PW3 told the court that he left for the accused's house together with his brother and the accused person. There, they found the deceased's body on the bed partly clothed. They had to call for a vehicle to transport the deceased's body because a crowd was gathering at the accused's home and wanted to beat him. The accused was then taken to Langas Police Station and the deceased's body to the Moi Teaching & Referral Hospital mortuary. Some police officers visited the scene of crime. He did not see any injuries on the body of the deceased but he knew that the accused and deceased had domestic issues. Indeed the family had prevailed upon the deceased to go back home but she had refused.

On cross-examination, PW3 stated that he was not present when the incident occurred. He stated that he knew that his sister took chang'aa but did not know if she made it at her home as he never used to visit her house. He stated that a neighbour had been informed of the death and this is how people began to go to the accused's homestead.

PW4 a farmer from Nanok, S C, told the court that on the material date at about 3 pm he was at a New Year Celebratory function with his sister J (deceased person) who was drinking alcohol and left at about 6 p.m. He stated that her husband, the accused person was not at the function. On the next day, he was with his brother, PW3, when the accused called them and told them that he had been trying to wake their sister up to make breakfast for the family but she did not wake up. They then went back to the accused's house where they found the deceased's lifeless body on the bed. The body was half-way covered downwards and he did not see any injuries on her body.

He testified that other members of the public came and wanted to beat up the accused

person but the police arrived on time and took him to Langas Police Station. They also took the body to the mortuary. He stated that his sister and the accused had been co-habiting and given birth to 3 children while she had 5 other children outside their union who lived on some land that their father had given her (deceased). The two constantly quarreled despite the intervention of the family.

In cross-examination, PW4 stated that the accused and deceased had lived together for 2 years. During this time, the deceased would go back to their home where she would stay for months. He stated that the accused appeared unsettled as he told them that the deceased had refused to wake up.

PW5, S T was the deceased's sister-in-law. She stated that the on 5th January 2012, she went to the Moi Teaching & Referral Hospital to identify the deceased's body for post-mortem purposes. She stated that she observed injuries on the deceased's legs on all sides which run from the thighs downwards. The injuries were in the form of black marks.

PW6, No. 231113, Chief Inspector Isaiah Ngetich told the court that on 2nd January 2012 he was called to Langas Police station and informed of a murder incident. He stated that upon arrival, he met Police Corporal Ekasi and PC Rop who led him to a murder scene at a place called [Particulars Withheld] in Langas. On arrival he took a total of 6 photographs and wrote a report which he produced as exhibits. The deceased's body was identified by her son F K.

In cross-examination, the witness stated that he was not sure what had caused the deceased's death.

PW7, No. 62636 P.C Lawrence Rop from Langas Police Station and the investigating

officer in the case, testified that on 2nd January, 2012, the accused had been taken to the police station by members of the public alleging that he had attempted to kill his wife. He booked the accused in the cells and went to the scene of crime together with his colleagues Inspector Ng'etich and Sergeant Ekasi. There, they found the deceased's body lying on the bed where she was said to have slept with her husband the night before. The body was halfway covered with a blanket. The deceased's family and friends identified her. The injuries were visible on her head, hands and legs. The son of the deceased told him that his father had beaten his mother with a stick which he threw away. He tried to look for the stick in vain. He oversaw the post-mortem exercise and took the accused person for mental assessment and finalized the investigations.

In cross-examination, he stated that he only interrogated 5 people at the scene of crime. He stated that no neighbour heard the deceased screaming for help. **PW8**, Dr. Walter Nalianya a pathologist at Moi Teaching & Referral Hospital performed the post-mortem on the deceased's body on 5th January, 2012. He found multiple bruises on the face and forehead as well as the lower limbs and around the buttocks which appeared to have been caused by whips. He stated that there was another injury on the abdomen and that upon dissection he found hemorrhages on the inner of the legs and hands and beneath the skin on the buttocks. He formed the conclusion that the cause of death was excessive subtravenous hemorrhage due to severe beatings. He produced the post mortem report as P. Exhibit 4. The deceased's body was identified to him by CK and ST.

The accused gave an unsworn statement of defence. He denied killing the deceased. He told the Court that on 1st January, 2012, he came from work at around 9 p.m. and his son opened the door for him. He inquired of his wife's whereabouts and his son showed him where she was lying naked on the floor. He learnt that his wife had gone for some

celebrations at her home where she drunk alcohol. She would not respond to him when he spoke to her and he carried her to bed, fed the children and they all slept. The deceased was unable to wake up the next morning and this is when he lit the jiko and prepared breakfast for himself and the children. He then left for work and later on met with the deceased's brothers whom he told of the fact that the deceased had been unable to wake up that morning. They then accompanied him to his house. On arrival there and after seeing the deceased who was lying in bed, they took a rope and began to beat him. The police later arrived and took him to the police station. He stated that he still had no clue what caused his wife's death.

SUBMISSIONS

The prosecution filed their written submissions which are dated 8th July, 2014. They submitted that the prosecution witnesses gave corroborative evidence. In particular that of PW2 was direct evidence as he saw the accused beating the deceased with a stick. The same was corroborated by PW8 the doctor who performed the post mortem. He confirmed the deceased died of injuries consistent with excessive beating. As such, the deceased did not die of natural cause but from the culpable acts of the accused.

It was also submitted that the accused had ample opportunity and the motive to cause the death of the deceased for which he should be held accountable.

On behalf of the accused, learned Counsel Mr. Okara filed submissions on 23rd June, 2014. He submitted that, from the evidence on record, the death of the deceased might have been occasioned by her drunken state. He urged the court to acquit him.

EVALUATION OF THE EVIDENCE

The fact of the death of the deceased was confirmed by PW8, the doctor who performed the post mortem. The post mortem report shows that the cause of death was extensive subcutaneous hemorrhages due to beatings. He noted that most of the injuries on the body were due to whipping.

The question then for determination is whether it is the accused he inflicted those injuries.

PW2, the accused's son testified that both the accused and the deceased arrived home together. The accused then started beating the deceased with a stick. He infact asked her to remove her clothes so that he could beat her while naked. It appears that it is the accused who finally removed the deceased's clothings as PW2 testified as follows:-

“On arrival home, my father beat up my mother with a stick inside the house. I saw her beat her on the knees. She was crying as she was being beaten. My mother did not fight back. He beat her for a long time

When my father was beating my mother she was naked. Her clothes were on the bed. When both arrived in the house my mother was dressed but my father undressed her as he beat her.”

PW1 further testified that after his father stopped beating his mother, his mother went to sleep. She was later joined by his father, the accused herein. Unfortunately, she never woke up alive.

All the other witnesses who testified never saw what transpired between the accused and the deceased. PW3, 4 and 5 only went to the deceased's house and found her dead. Apparently, the accused had informed PW3 and 4 on the morning of 2nd January, 2012

that he had tried waking up the deceased that morning to no avail.

From the testimony of PW3, the accused already knew on 2nd February, 2012 that the deceased was already dead. He stated that when he tried waking her up in vain he dressed her, covered her and thereafter made their breakfast. It is then that he proceeded to inform PW3 and 4 that the deceased had not woken up. Obviously, he wanted to let them know that their sister was dead.

Of course, no other person is said to have participated in the beating of the deceased. And given the fact that the fatal injuries were consistent with beatings (whippings), I conclude that they were occasioned by the accused. And although the assault weapon was never recovered, the fact that the accused was seen beating the deceased sufficiently leads to the conclusion that he was the culprit.

It is also worth to note that the beating took a long time. Hence the evident cause of hemorrhage that led to the eventual death.

Let me also state that I have seen the photographs that were taken at the scene of crime. The body of the deceased bear very visible marks on the legs, face and the back. At the back is a very long mark which is indicative of the whips running through her body. I cannot doubt it is the accused who inflicted those injuries.

As to whether the accused possessed malice afterthought, it is clear that both used to have family (domestic) quarrels so often. According to PW3, 4 and 5, the family had interviewed in the course but the quarrels appear not to have subsided.

It also appears that both had come home drunk. Although the accused insinuated that he arrived home earlier than the deceased, that contention is rebutted by PW1 who testified

that both arrived home together. It appears that the two picked a quarrel on arrival home as was usual. The accused then started beating the deceased, although he probably did not envision that the beating would cause her death. Probably to him, it was one of their usual beats. And this is indicated by the fact that the deceased went to bed to rest but was never to wake up alive.

Under those circumstances, although the violence meted against the deceased was excessive, the deceased cannot be said to have had the mens rea to kill her. He did not have the malice aforethought to kill the deceased. Hence, I find that the prosecution has only proved a charge of manslaughter and not murder under Section 203 of the Penal Code.

In the result, I find the accused guilty of the offence of manslaughter contrary to Section 202 of the Penal Code and I convict him accordingly.

DATED and DELIVERED at ELDORET this 9th day of October, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Okara for the Accused

Mr. Mulati for the State